Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

ROBERT M. DRASKOVICH and DEAN Y. KAJIOKA

Petitioners,

v.

ROBB EVANS & ASSOCIATES, L.L.C. and
FEDERAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Issue Number 1:

Draskovich and Kajioka had no independent duty to investigate the source of their fees, other than to compare the payment to the District Court orders existing at that time. The Fifth Circuit's decision – that lawyers are obliged to "audit their clients" to determine the source of the fee paid is at odds with Federal Rules of Procedure, equitable principles and case law in the circuits.

Issue Number 2:

The right to counsel is guaranteed by the Constitution, and should not be superseded by a District Court order on a preliminary matter.

Issue Number 3:

At the time that Draskovich and Kajioka were paid their retainers, the party making the payment was not the subject of any court order. The Court had not even been asked to make a ruling that would have prevented the money being paid to a lawyer. An after the fact decision that the money was tainted cannot be used to support a forfeiture.

LIST OF INTERESTED PARTIES

Robert M. Draskovich	Petitioner / Non-Party in District Court
Dean Y. Kajioka	Petitioner / Non-Party in District Court
Federal Trade Commission	Plaintiff /Respondent
Robb Evans & Associates	Respondent

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Robert M. Draskovich & Dean Y. Kajioka file this Petition for Writ of Certiorari. In sofar as is possible, the parties will be referred to by name.

OPINIONS BELOW

This case originated in the United States District Court for the Western District of Texas. The District Court ordered Draskovich and Kajioka to repay fees that they had been paid by persons who were involved in the litigation that involved the Federal Trade Commission and Assail. The District Court's orders are included in Appendix B,C, D. Draskovich and Kajioka appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit issued a published opinion. *Federal Trade Commission v. Assail*, 410 Fed.3rd 256 (5th Cir. 2005). That opinion is included as Appendix A. The Opinion was issued on May 19, 2005.

STATEMENT OF JURISDICTION

Jurisdiction of the Court is founded on 28 U.S.C. § 1254(1). This Court should grant this Petition because the decision of the Fifth Circuit, decided important questions of federal law that had not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

14th Amendment, U.S. Constitution:

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6th Amendment, U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 65, Fed. R. Civ. P.:

* * *

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

* * * *

INTRODUCTION

The Fifth Circuit held, in this case, that lawyers have a professional duty to "audit" their clients to determine the source of any fee that is paid. The purpose behind this newly imposed duty is to insure that the fee does not come from an inappropriate source.

The Fifth Circuit's new "duty to audit" is specifically at odds with other circuits. The Sixth Circuit previously discussed the lawyer's duty to investigate the source of his fee in 1988. *In re Bell & Beckwith*, 838 F.2d 844, 848 (6th Cir. 1988). The *Bell and Beckwith* case suggested two standards. Under the insolvency standard, if defense counsel has a subjective belief that the total assets belonging to the client exceed the fraudulent amount named in the controversy, then the attorney should be found to be without inquiry notice, and the duty to inquire never arises. On the other hand, under the nature of the property standard, the very nature and character of the property received by the attorney may put her on notice that the property may be derived from the proceeds of a fraudulent conveyance. *Id* at 849. Both of these standards balance the individual's right to representation against the interests of the public in a judicial system that proscribes fraudulent conduct. Both standards are capable of practical application in almost every case, and both standards are consonant with the principles that apply to Temporary Restraining Orders or Injunctions.

The Fifth Circuit's standard – requiring an "audit" of the client's tendered fee – introduces loaded terminology (implying an accounting process virtually guaranteeing accuracy) into the relationship between lawyer and client that is unnecessary and impractical. Moreover, the new standard is actually at odds with other authority. In *CFTC v. Co. Petro Marketing Group, Inc.*, 700 F.2d 1279 (9th Cir. 1983), the Court held that the duty of a lawyer to inquire with regard to his fee is actually the duty to inquire into the precise terms of a Court order. The *Co. Petro* standard is